Supreme Court of the United States

OCTOBER TERM, 1947

No. 366

WATCHTOWER BIBLE AND TRACT SOCIETY,

Petitioner,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA, CITY OF LYNWOOD, CALIFORNIA, and H. L. BYRAM, County Tax Collector,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Respondents.

WESTERN PRINTING COMPANY, WHITTIER

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TABLE OF CASES AND AUTHORITIES CITED

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A.

Statement of Facts

The facts in the case are recited in the decision of the California Supreme Court as follows:

"Plaintiff is a corporation organized by Jehovah's Witnesses, a religious sect, to assist in fos-

tering their creed. Plaintiff owns real property in defendant county upon which buildings are situated. This property is used for religious purposes. (An exemption was claimed and allowed for that real property pursuant to the Constitution (Cal. Const., Art. XIII, sec. 1½) and no dispute exists with reference to it.) Plaintiff owns and stores in one of said buildings pamphlets, books and other literature which are used by it and the Jehovah's Witnesses in the exercise of their religion and for proselyting purposes. The buildings being the distribution point for said literature. The literature so stored was assessed as personal property subject to taxation. . . . " (Tr. of Rec., p. 20, fols. 39-40.)

"It is a uniform, non-discriminatory tax levied upon all property alike, personal and real, regardless of the use to which it is put, pursuant to the constitutional provision reading: 'All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided.' (Cal. Const., Art. XIII, sec. 1.) . . . " (Ib., p. 20, fol. 43.)

Petitioner paid the tax under protest, (Ib., p. 9, fol. 15) and filed action under statute authorizing suit for the recovery of taxes upon an erroneous assessment, (Cal. R. & T. Code, sections 5136 to 5141) asserting that the property was tax exempt and "that the tax so levied is invalid as a violation of the right of religious liberty and freedom of speech and the press as guaranteed by fundamental law." (Ib., p. 20, fol. 40.)

Judgment in the trial court went against petitioner. The Supreme Court of the State affirmed such judgment and sustained the tax, holding that the same constituted no infringement of constitutional right. Upon the facts the Court further said:

> "There are two important factors bearing upon this problem that should first be considered.
>
> "First, the tax levied here was one solely for the purpose of revenue to defray the general expenses of government, no element of regulation being involved. It is not a license tax—a tax on the exercise of a right, privilege, occupation, calling, or activity, and is payable whether or not the property is used in a commercial profit motive enterprise. Nor does it impose any conditions or restrictions upon the use of the property taxed. It is solely a general *ad valorem* property tax which is the chief source of revenue for the local government." (Ib., p. 22, fols. 42-43.)

B.

The Question Sought to Be Raised in This Case and Upon This Petition

Two questions were involved in the State Court, to wit: (1) as to the liability to the general property tax of petitioner's Bibles, literature and other stored personal property, under the provisions of the California Constitution exempting real property and improvements from taxation if used exclusively for religious worship; (that question of state law is concluded by the adverse determination of the State Court) and (2) as to the liability to the general property tax of petitioner's Bibles, literature and other stored personal property, under the provisions of the First and Fourteenth Amendments of the Federal Constitution assuring freedom of religious worship and of speech and of the press.

The question is so stated by the petition too, although twice repeated as constituting two questions. (Pet., p. 3.) The position of petitioner was stated by the State Court, as follows:

> "The argument advanced by plaintiff in support of its contention that the tax here involved is invalid, is to the effect that a general, uniform, non-discriminatory *ad valorem* property tax for revenue purposes may not be imposed upon the property of a religious organization used by it in the exercise of its religion or worship by reason of the religious liberty guarantee, and, in the in-

stant case, the property consisting of literature, by reason of the guarantee of freedom of speech and press." (Tr. of Rec., p. 22, fol. 42.)

C.

No Present Constitutional Question Is Involved

The petition for *certiorari* should be denied. No present constitutional question is involved. The petition does purport to state a constitutional question. In truth, however, no constitutional question is involved. Actually the only possible constitutional question has been settled. The decisions of this high court have definitely resolved the question and against petitioner. No question of constitutional law longer remains.

D.

The Guaranties of Freedom of Religious Worship and of Speech and of the Press Are Guaranties of Freedom of Action, Not Grant of Exemption From Non-discriminatory Property Taxation.

The guarantee by the First and Fourteenth Amendments to the Constitution of freedom of religious worship and of speech and of the press are assurance of freedom of action or activity, not exemption from equalized and non-discriminatory property taxation. This court has so declared. No debatable or present constitutional question is raised by this petition for *certiorari*. The writ should be denied for two reasons.

(1) The Constitution assures freedom of action in the three specified realms of personal activity, of speech, press and worship, but not in the realm of property or of property ownership free from taxation.

(2) The tax herein protested was not a tax or a levy upon any action or activity, nor an imposition or burden upon any of the three specified freedoms.

The freedoms of speech and of the press and of worship are personal rights and liberties in the three named spheres (1) of speaking, and (2) of writing, and printing and publishing, and (3) of worshipping. These provisions of the Constitution make no declaration and attempt no assurance with regard to property.

The petition merely confuses the nature and scope of these fundamental guaranties when it seeks to apply them to physical properties. The petition fails to analyze what it is that is assured, i. e., the distinction between (1) the assured activity and (2) the mere property used in the activity. A little analysis will show the course of the confusion. The guaranties of freedom of speech and of the press and of worship are guaranties of personal rights. They assure the freedom of the individual and his right to do and to act. Any tax attempted as a condition of or prerequisite to the exercise of such freedom or right would infringe. The guaranty is not a guaranty with regard to property or property ownership—not even with regard to property used or which may be used or which is to be used in the exercise of or in connection with the guar-

anteed activity. Quite mistaken is the petition's idea that "things used which are necessary to the enjoyment of the rights guaranteed by the first amendment are as strongly protected from taxation as are things which move in foreign commerce protected against taxation by the import-export clause of the Constitution." (Pet., p. 19.)

The petition cites the decisions which overturned constraining ordinance or license exaction on itinerant preachers. Such decisions, however, do not support the petition's claim of tax exemption for the stored literature. Such disapproved ordinance or exaction was a restrictive limitation upon the activity and on the freedom of religious worship and of speech. But freedom for religious worship and speech does not mean tax freedom or exemption for the property. The assured liberty, the specified freedoms of thought and action are not infringed by non-discriminatory taxation of property, even though employed in such protected activities.

Non-discriminatory property tax upon the stored literature, even if used in worship, could in no sense be a tax upon any act of worship or of printing or publishing. Yet the petition asserts that a tax on books, as on property employed in worship, is a tax on the act of worship and that a tax upon printed matter is a tax on printing and distributing. Petitioner says:

> "The taxing of any step in the process of printing, publishing and distributing literature is an uncon-

> stitutional abridgement of freedom of the press." (Pet., p. 12.)

Freedom to print or immunity for "the process of printing" embrace neither the machinery nor the materials used in printing, nor the printed product. Yet the petition incontinently argues that whatever makes the distribution of literature more expensive is forbidden.

The petition seeks to see the property tax in question as a tax on an act, to wit, in succession as a tax on printing, on publishing, on distributing, on storing. The petition says:

> "The taxing of any step in the process of printing, publishing and distributing literature is an unconstitutional abridgement of freedom of the press." (Pet., p. 12.)

The attempt to criticize the tax upon printed literature as a tax on the act of printing, or on the act of distributing the printed literature, is merely unconsidered assertion. The tax is a property tax, a tax on the tangible personal property, but not a tax or a burden on any act of printing or publishing or distributing.

Again, dislocating the tax from its actual imposition upon the taxable personal property in order to affix it to an act, to wit, to the act of circulating literature, the petition says:

> "Freedom of the press is not confined to the mere printing of literature. It embraces also circulation. 'Liberty of circulating is as essential to that

> freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' . . . " (Ib., p. 12.)

The petition coins a metaphor, and calls publication a "stream," refers to the "flowing stream of publication," says that "the entire flowing stream must be kept open, pursuant to the mandate of the Bill of Rights and the Constitution of the United States and California." (Ib., p. 14.) Under the euphony of its metaphor the petition asserts that the Constitution's protection "extends from that stream's source to its termination, which is the delivery of the literature to the millions of recipients thereof throughout the nation, including California." (Ib., p. 14.)

Again, in endeavor to affix the tax to something else than to the property, the petition tries to affix it to the storing of the literature. Carried on by the sweep and current of its metaphor, the petition continues:

> "Storage of the literature at the Lynwood Depot by the society is as much a part of the process of circulation as is the handing of a piece of literature by one of the missionary evangelists to a person, as the evangelist moves from door to door in his assigned territory. Without a place to store literature the liberty of printing and distributing it would be of little, if any, value. . . . " (Ib., p. 12.)

Storage is necessary to effective distribution, the petition says:

> "Storage of literature for redistribution to evangelists for final delivery to the people of California is as necessary a step in the process of petitioner's publishing as is the stevedoring step in the process of shipping in foreign commerce. Accordingly it should have the same exemption from taxation." (Ib., p. 14.)

And, again:

> "Certainly none would have the audacity to argue that the storage of literature is not a part of the process of publishing. . . . " (Ib., pp. 14-15.)

What was taxed was not any act, not the act of storing literature, but, instead, the literature itself, the tangible physical property. The power and the right to act (to publish, to store, to circulate, to worship) continued unrestricted and entirely free. The only burden even, was the common burden of equal and nondiscriminatory tax, resting alike on this and all other property.

The argument by the petition seems to follow this course: Major premise, that a tax on any of the protected activities of printing, publishing or distributing literature would be bad. The argument omits the minor premise of its syllogism and leaps from the major premise direct to a conclusion, to wit, that therefore this tax is bad as a tax on one or more of such protected activities. Utterly inapplicable to the facts is the reasoning by the petition.

"Since circulation cannot be burdened by taxation, no part of the process of circulation can be impeded or stagnated by taxation. . . . " (Pet., p. 15.)

The tax is not a tax on the act of circulating or on any act of printing, literature, or on any step or incident connected with any such act. The petition's difficulty is not with its statement of principle. The difficulty is that the tax was not a tax on publishing, printing, distributing or storing, or on any step or process in connection therewith.

The tax upon the stevedoring of ship cargo was unconstitutional taxation of a vital step or activity in foreign commerce, indeed a step and activity in the very exporting process. (*Joseph v. Carter & Weekes,* 67 S. Ct. 815 (Cited Pet., p. 13.) The property tax herein is nothing like such tax upon acts done in the process of transporting and upon incidents in the activity of commerce. Non-discriminatory taxation of literature as personal property is by no possibility taxation of the activity of producing or distributing or storing the literature.

Petitioner must not assert that to be taxed which is not taxed. It is not open to petitioner to assert taxation of the act of speaking, or of printing, publishing or circulating, or of the act of worshipping when, instead, the tax is upon literature in storage. It is no more open to the claimant of a right to declare the incidence of a tax contrary to the fact than it is open

to the claimant of a right to determine that to be worship which by no possibility is worship. Freedom of worship does not excuse polygamy. (*Church of Jesus Christ v. United States,* 136 U. S. 1, 34 L. Ed. 478; *Reynolds v. United States,* 98 U. S. 145, 25 L. Ed. 244.)

Merely asserting that a book or literature is worship cannot constitute such property an act. A book or printed matter is not worship—not an act nor any part or step in the act of preaching, or of the process of worship. It can be at most only an instrument, or a property used in preaching or in worship. A thing is not the protected action. A noun is not a verb.

The petition quotes the striking phrase from *McCulloch v. Maryland* that "The power to tax is the power to destroy," and conjuring up a total threat against all its activities, voices dramatic apprehension that "that destructure is a grim and appalling reality in the instant case." (Pet., p. 16.)

The declaration of the Court in *McCulloch v. Maryland,* is, of course, thoroughly sound that:

> "We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power."

The taxing authorities can, however, and must in performance of their duties as public officers determine what it is that is being taxed and whether taxation of the physical instrument employed or the physical

property distributed is taxation of the activity; and what is direct and a burden on the activity, and what is indirect and merely remote.

The petition's consideration of *Nippert v. City of Richmond,* 327 U. S. 416, (Pet., p. 23) points petitioner's confusion in the assertion that "the literature protected by the Bill of Rights against taxation is as free from the *ad valorem* taxes as is goods in interstate transit." (Pet., p. 23.) Goods while in transit are exempt because in interstate commerce. Petitioner's literature at rest and in storage is not in transit, nor is it exempt as the act of publishing or of worshiping. The Court in the *Nippert* case says that a tax upon "some local incident" in the course of interstate commerce constitutes a tax upon the commerce itself. Petitioner seeks to see its taxed literature as an "incident" in worship. An "incident," of course, is a part of an act or happening. The Court in the *Nippert* case speaks of acts and incidents which "take place within the confines of the states" and "incidents occurring within each state," definitely indicating that the Court was talking about acts and happenings and not about physical property.

The petition concedes that

> " . . . the newspapers and other publishers are not exempt from ordinary forms of taxation. They are required to pay various types of taxes, Federal and State, including net income taxes. . . . All these are the ordinary form of taxation." (p. 19.)

Clearly the freedom of speech does not free the printer from tax burdens common to all. The printer is liable to non-discriminatory taxes upon his presses and printer's supplies and materials. Similarly the worshiper is not freed from the common restraints laid upon conduct and behavior. The petition does not avoid the direct applicability of its concession by objection that

> " . . . because the public press can be required to pay ordinary form of taxation, one could not successfully contend that such newspapers and publishers could be required to pay a tax upon the distribution of their literature or the printing thereof." (Pet., p. 19.)

The tax herein was a tax upon property and not upon the act of distributing or printing.

The exemption of property in interstate commerce does not exempt the rolling stock of the railroad. The exclusive jurisdiction of the Federal Government over interstate or foreign commerce does not preclude local taxation of the property employed in such commerce. Freedom from State control does not free from non-discriminatory taxation the railroad cars or vessels or the other physical instruments of such commerce.

Over fifty years ago in *Adams Express Co. v. Ohio St. Auditor* (1896), 165 U. S. 194, 41 L. Ed. 683, this Court said:

> "Although the transportation of the subject of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation,

yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally as all business is affected by the necessity of contributing to the support of government. . . . " (41 L. ed. 695.)

In a later case of the same title in 166 U. S. 185, 41 L. ed. 965, this Court said:

"Again and again has this court affirmed the proposition that no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce. And it has as often affirmed that such restriction upon the power of a state to interfere with interstate commerce does not in the least degree abridge the right of a state to tax at their full value all the instrumentalities used for such commerce." (p. 976.)

In *United States Express Co. v. Minnesota*, 223 U. S. 335, 56 L. Ed. 459, the Court said:

"The right of the state to tax property, although it is used in interstate commerce is thoroughly well

> settled. . . . The difficulty has been, and is to distinguish between legitimate attempts to exert the taxing power of the state and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such. This difficulty was recognized in *Galveston, H. & S. A. R. Co. v. Texas,* 210 U. S. 217, 52 L. ed. 1031. . . . Mr. Justice Holmes, speaking for the court, said:
>
> > " 'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.' . . . " (p. 465.)

In *Pullman's Palace Car Co. v. Commonwealth of Pennsylvania,* 141 U. S. 18, 35 L. Ed. 613, the Court noticed and disposed of an objection of the kind urged by petitioner herein, saying:

> "Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. . . . " (p. 617.)

And the Court said:

> "The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupa-

tion; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation, on account of its property within the State, is, in substance and effect, a tax on that property. . . . "The cars of this Company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. . . . " (p. 617.)

In *Wells, Fargo & Co. v. Nevada,* 248 U. S. 165, 63 L. Ed. 190, the Court said:

" . . . consistently with the commerce clause of the Federal Constitution, the state could not tax the privilege or act of engaging in interstate commerce, but could tax the company's property within the state, although chiefly employed in such commerce. . . . " (p. 191.)

Murdock v. Pennsylvania, 319 U. S. 105, 87 L. Ed. 1292, too declares the rule, saying:

"A state may not impose a charge for the enjoyment of a right granted by the federal constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce. (*McGoldrick v. Berwind-White Coal Min. Co.,* 309

> U. S. 33, 56-58, 84 L. Ed. 565, 576, 577, 60 S. Ct. 388, 128 A. L. R. 876), although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory." (p. 1298.)

As further recognizing and applying the distinction declared in the above mentioned cases, see *Johnson Oil Ref. Co. v. Okla.*, 290 U. S. 158, 78 L. Ed. 238; *Northwest Air Lines v. Minn.*, 322 U. S. 292, 88 L. Ed. 1283; *St. Louis and S. W. Ry. Co. v. Nattin*, 270 U. S. 157, 72 L. Ed. 830.

Breedlove v. Suttles, 302 U. S. 277, 82 L. Ed. 252, upheld the validity of a Georgia statute imposing and requiring payment of a poll tax as a prerequisite to the right to register and vote, as against the contention that it was an infringement of the privileges and immunities assured by the Fourteenth Amendment and the Nineteenth Amendment. The language of the court as to the Nineteenth Amendment and the right to vote is directly applicable here. The Court discredited the very contention made by petitioner herein, saying of the constitutional amendment:

> "Its purpose is not to regulate the levy or collection of taxes. The construction for which appellant contends would make the amendment a limitation upon the power to tax. . . . " (Ib., p. 256.)

And the Court upheld the State statute saying:

> "It is fanciful to suggest that the Georgia law is a mere disguise under which to deny or abridge

the right of men to vote on account of their sex. The challenged enactment is not repugnant to the Nineteenth Amendment." (Ib., p. 256.)

In *Follette v. McCormick*, 321 U. S. 573, 88 L. Ed. 938, the Court pointed the error of Watchtower's claim of immunity from tax herein when it said:

> "The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the Murdock Case, 319 U. S., p. 112. But to say that they like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment had made a high constitutional privilege." (p. 941.)

Petitioner's argument is merely specious. It confuses the protection assured to an activity, in order to claim a gratuity for the property used in the activity. It would convert the tax on the mere property employed into forbidden restriction upon the activity.

The injunction against infringing the liberty of the press (or the circulation of literature) is not injunction against taxation of the property circulated or of property employed in the circulation. Neither is "circulation"; and taxation of such property is not taxation of the activity or of any step in "the process of circulation."

The decision of the California Supreme Court is in accord with these decisions. It says:

"It has never been supposed that the property used in the exercise of the rights of freedom of press or religion is not subject to a uniform tax for revenue imposed upon all alike. It is the general rule that property used in connection with the publication of a newspaper has no special immunity from the general laws. (*Mabee v. White Plains Pub. Co.*, 327 U. S. 178; *Okl. Press Pub. Co. v. Walling*, 327 U. S. 186; *Associated Press v. Labor Board*, 301 U. S. 132.) And instrumentalities used in connection with the press and the publication business are subject to normal uniform general taxation. (*Grosjean v. American Press*, 297 U. S. 233; *Giragi v. Moore* (Ariz.), 58 Pac. 2d 1249, 64 Pac. 2d 819, appeal dismissed 301 U. S. 670, on authority of *Grosjean v. American Press, supra; Arizona Pub. Co. v. O'Neil*, 22 Fed. Supp. 117, affirmed 304 U. S. 543, on authority of *Grosjean v. American Press, supra; 110 A. L. R.* 327; *35 A. L. R.* 7; Thayer, Legal Control of the Press, p. 64.) In the *Grosjean* case the court declared invalid a statute which imposed a license tax, based on gross receipts, for the privilege of engaging in the business of publishing advertisements in any newspaper or publication whatever. There, however, the application of the tax was measured, not by the volume of advertisements, but by the extent of the circulation of the publication in which the advertisements were carried, *showing an express purpose* to penalize certain publishers and curtail circulations. (*Mabee v. White Plains Pub. Co., supra; Okl. Press Pub. Co. v. Walling, supra.*) The court was careful to point out that; 'It is not intended by anything we have said to suggest that

the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

" 'The predominant purpose of the grant of immunity here involved was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. (*Grosjean v. American Press Co., supra,* 250.) The recent cases in the United States Supreme Court have stated a similar rule. In *Murdock v. Pennsylvania,* 319 U. S. 105, the court denounced an ordinance requiring the payment of a license tax as a condition to soliciting as applied to the pursuit of the activities of religious colporteurs, Jehovah's Witnesses, as in the case at bar, in distributing their literature and receiving (at the

will of the distributee) a price therefor. The sole issue as stated by the court was 'the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax *as a condition to the pursuit of their activities.*' (p. 110.) (Emphasis added.) (The tax in the instant case is not a license tax and the payment of it is not a condition to the pursuit of plaintiff's activities.) And the court went on to say: 'We do not mean to say that religious groups and the press are free from all financial burdens of government. See *Grosjean v. American Press Co.*, 297 U. S. 233, 250 (the portion of the Grosjean decision heretofore quoted). We have here something quite different, for example, from a tax on the income of one who engages in religious activities or *a tax on property used or employed with those activities.* It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. . . . It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. Thus, it may not exact a license tax for the privelege of carrying on interstate commerce (*McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 56-58), although *it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not* discriminatory. Id., p. 47, and cases

cited.' (p. 112.) (Emphasis added.) The foregoing limitation on the holding of the majority opinion in the *Murdock* case and the rule applicable here is elucidated to the dissent of Justice Reed: 'Nor do we understand that the Court now maintains that the Federal Constitution frees press or religion of any tax except such occupational taxes as those here levied. Income taxes, *ad valorem* taxes, even occupational taxes are presumably valid, save only a license tax on sales of religious books.' (Op. 129.) In *Follette v. McCormick*, 321 U. S. 573, the same type of ordinance considered in the *Murdock* case was involved and the court again stated the exception applicable in the case at bar as follows: 'This does not mean that religious undertakings must be subsidized. The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the *Murdock* case, 319 U. S., p. 112. But to say that they, like other citizens, may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege.' (Op. 577.)

"As we have seen the tax here involved is not such a burden on the exercise of religion as to render it invalid. It is not of the character heretofore denounced by the Supreme Court of the United States. While the power to tax may involve the power to destroy it is clear that no such result will be accomplished by the tax here imposed. The

property here involved is required to bear only its share of the burden of the maintenance of the government which is for its protection equally with other property in Los Angeles County. The very liberty invoked is made realistic by the protection afforded by that government." (Tr. of Rec., pp. 23-25, fols. 44-48.)

Conclusion

Four possible considerations may be urged in connection with the freedoms guaranteed by the Constitution, to wit,

(1) As to the protected *Act* (speaking, communicating, printing, publishing, or worshiping).

(2) As to the *materials* used to produce book or newspaper or the like.

(3) As to the *instrument* used in the activity of speech, press or worship (machinery, bibles, books, musical instruments).

(4) As to the *product* (book or newspaper).

The first alone of the foregoing four is the assured personal freedom and liberty. Only freedom as to the specified act is the personal freedom and liberty assured by the Constitution as the right of a free people. The assurance of these personal privileges does not extend to property, nor intend the release of property from tax or other burden. The Constitution assures freedom of action; assures personal liberty

against restraint or limitation. Immunity from nondiscriminatory property tax does not fall within the assurance. Under the decisions there is no longer a question on the point. The petition presents no present or yet subsisting constitutional question. The writ should be denied.

Respectfully submitted,

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and
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